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5 Attorney for Defendant  
JUAN GIL

7 UNITED STATES DISTRICT COURT  
8 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION

11 UNITED STATES OF AMERICA )

Case No.: 2:10-CR-00351-ODW-02

12 Plaintiff, )

**MOTION TO SUPPRESS WIRETAP  
EVIDENCE SIEZED FROM  
UNLAWFUL DELEGATION OF  
WARRANT EXECUTION TO NON-  
LAW ENFORCEMENT,  
UNTRAINED, UNSUPERVISED  
CIVILIANS FOR HIRE**

13 v. )

14 ARMANDO BARAJAS, et al., )  
15 JUAN GIL (2) )

Defendant. )

Hearing Date: July 30, 2012  
Hearing Time: 10:00 a.m.

18 TO THE UNITED STATES ATTORNEY ANDRE BIROTTA AND ASSISTANT  
19 UNITED STATES ATTORNEY REEMA EL-AMAMY and all interested parties:

20 **PLEASE TAKE NOTICE** that on date or as soon thereafter as this may be heard,  
21 in the Courtroom of the Honorable Otis D. Wright, II, defendant Juan Gil by and through  
22 his attorney Alan Eisner will and hereby do move to suppress any and all evidence seized  
23 or gathered, directly or indirectly, as a result of unlawful electronic eavesdropping and  
24 surveillance.

25 This motion is made on the grounds that wiretap evidence was seized from  
26 unlawful delegation of warrant execution to non-law enforcement, untrained,  
27 unsupervised civilians for hire.

28 This motion is based on this notice of motion, the attached memorandum of points

1 and authorities, all files and records in this case, exhibits, and all evidence to be presented  
2 at the time and place herein scheduled for the making of this motion.

3  
4 Respectfully submitted,

5 KESTENBAUM EISNER & GORIN LLP

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7 Dated: June 30, 2012

/S/ ALAN EISNER

8 ALAN EISNER  
9 Attorney for Defendant  
JUAN GIL

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1                   **MOTION TO SUPPRESS WIRETAP EVIDENCE SEIZED FROM UNLAWFUL**  
2                   **DELEGATION OF WARRANT EXECUTION TO NON-LAW ENFORCEMENT,**  
3                   **UNTRAINED, UNSUPERVISED CIVILIANS FOR HIRE**

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5                   **INTRODUCTION**

6                   Over the course of nearly a year, the government seized hundreds of telephone  
7 conversations between the defendants and others through a series of wiretaps where it  
8 delegated the sensitive task of executing the electronic searches to non-law enforcement  
9 civilian contractors without any apparent need or justification for doing so. Defendants  
10 hereby move to suppress the evidence gathered through those wiretaps as the product of  
11 an unconstitutional search and seizure.

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13                   **STATEMENT OF FACTS**

14                   In February 2009, the government sought a wiretap on the telephones of Marco  
15 Antonio Torres-Cruz, whom it knew at the time as “Alex,” and Jose Lopez, a person  
16 suspected to be Torres-Cruz’s drug supplier. Bates 002-03, 095. The government  
17 promptly expanded its wiretapping activity to intercept conversations over various  
18 telephones used by defendants Torres-Cruz, David Navarro, and Armando Barajas, and  
19 others. The wiretapping activity initially sought to intercept conversations of 19 different  
20 specific individuals, a number that steadily progressed until the last wiretap when the  
21 government tripled the number of targets to 58 different named individuals. In addition  
22 to the specifically named individuals, each wiretap also sought to intercept the telephone  
23 conversations of “others known, unknown or unidentified” as being among those  
24 included identified as “the Target Subjects.” E.g. Bates 005, 097, 121, 225, 267, 352,  
25 390, 485, 525, 640, 711, 830, 876, 981.<sup>1</sup>

26                   The government sought wiretapping authorization because it anticipated that some  
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28                   <sup>1</sup>See also Bates 026, 145, 292, 414, 544, 728, 893 (describing Target Subjects as  
including “and others yet unknown”).

1 of the conversations might relate to “the acquisition and distribution of controlled  
 2 substances and money.” Bates 006, 098, 122, 226, 268, 353, 391, 487, 525, 640, 711,  
 3 831, 876, 981.<sup>2</sup> However, law enforcement also recognized that others besides the  
 4 specifically named individuals would have access to, and use, the targeted telephones.  
 5 Bates 091, 218, 342-43, 475, 626, 815, 964. Indeed, the applications and court orders  
 6 expressly anticipated the likelihood that wiretaps would capture conversations that were  
 7 entirely unrelated to the alleged conduct being investigated. Bates 016, 090-91, 106-07,  
 8 132, 218, 234, 278, 342, 362, 401, 474, 495, 535, 626, 649, 721, 815, 839, 886, 964, 990  
 9 (law enforcement anticipated need to minimize interception of conversations outside the  
 10 scope of the wiretap orders). The government also anticipated that conversations and  
 11 communications would take place over the targeted telephones that were “not otherwise  
 12 subject to interception pursuant to this Order,”<sup>3</sup> either because none of the target subjects  
 13 was participating in the conversation,<sup>4</sup> the persons on the line did not include persons  
 14 identified as co-conspirators,<sup>5</sup> the subject matter of the conversation was not criminal,<sup>6</sup>  
 15 the subject matter of the conversation was unrelated to the investigation or outside the  
 16 scope of the interception order,<sup>7</sup> or no less importantly, the conversation itself was  
 17 entitled to a claim of privilege.<sup>8</sup>

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 20 <sup>2</sup>See also Bates 028-29, 147-48, 294-95, 416, 551, 736-37, 902-03.

21 <sup>3</sup>Bates 016, 132, 278, 401, 535, 721, 886.

22 <sup>4</sup>Bates 092, 219, 344, 476, 626-27, 816, 965.

23 <sup>5</sup>Bates 092, 219, 344, 476, 626-27, 816, 965.

24 <sup>6</sup>Bates 016, 091, 092, 107, 132, 218, 219, 234, 278, 343, 344, 362, 401, 475, 476, 495,  
 25 535, 626-27, 649, 721, 815, 816, 839, 886, 964, 965, 990.

26 <sup>7</sup>Bates 016, 091, 092, 107, 132, 218, 219, 234, 278, 343, 344, 362, 401, 475, 476, 495,  
 27 535, 626, 626-27, 649, 721, 815, 816, 839, 886, 964, 965, 990.

28 <sup>8</sup>Bates 016, 091, 092, 107, 132, 219, 234, 278, 344, 362, 401, 476, 495, 535, 626-27,

1        Each of the orders contains identical language regarding the interception of  
 2        communications from the targeted telephones. Each order authorized law enforcement to  
 3        “intercept wire or oral communications, and contemporaneously received or retrieved  
 4        voice mail, to and from, and any background conversations intercepted in the vicinity of”  
 5        the targeted telephones. Bates 094-95, 100, 222-23, 227-28, 349-50, 355, 482-83, 488,  
 6        636-37, 642, 826-27, 832, 977-78, 983.<sup>9</sup> Each order further provided that “the  
 7        communications of the Target Subjects, and others known, unknown, or unidentified are  
 8        to be intercepted.” Bates 100, 228, 355, 488, 642, 833, 983.<sup>10</sup> None of the orders  
 9        otherwise limited the nature of the scope of communications on the targeted telephones  
 10      that law enforcement was permitted to listen to and seize. *Id.*

11        Nonetheless, ostensibly under the authority of 18 U.S.C. § 2518(5), instead of  
 12        having the delicate task of intercepting, listening to, and selecting the conversations to be  
 13        seized performed by professional, trained law enforcement officers, the government  
 14        sought and obtained permission to delegate those tasks to “individuals operating under a  
 15        contract with the government.” Bates 008, 015, 100, 106, 124, 131, 227, 234, 270, 277,  
 16        355, 361, 394, 401, 488, 494-95, 527, 534, 642, 648-49, 714, 720-21, 832, 839, 878, 885,  
 17        983, 989.

18        In support of the applications, the affiant did not suggest, and the court orders did  
 19        not find: (•) any need for the search and seizure task to be delegated to private civilian  
 20        contractors, (•) the nature of any conditions that would prompt, trigger or justify such a  
 21        delegation, (•) any minimum standards of training or qualification for any civilian  
 22        contractors, (•) the nature or extent of any law enforcement supervision of the civilian  
 23        contractors, (•) any circumstances suggesting a government need for special skills or

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24  
 25        649, 721, 816, 839, 886, 965, 990.  
 26

27        <sup>9</sup>See also (applications) Bates 002, 008-09, 118, 124, 264, 270-71, 387, 394, 521, 527-  
 28        28, 707, 714, 872, 878-79.

<sup>10</sup>See also (applications) Bates 005, 009, 121, 125, 267, 271, 390, 394, 525, 528, 711,

1 knowledge not possessed by law enforcement, (•) any other showing of need before  
 2 delegating tasks to the civilian contractors, (•) or any specification of the nature or type of  
 3 supervision to be provided to the civilian contractors asked to execute the searches and  
 4 seizures of otherwise private conversations.

5

## 6 ARGUMENT

7 “Though physical entry of the home is the chief evil against which the wording of  
 8 the Fourth Amendment is directed, its broader spirit now shields private speech from  
 9 unreasonable surveillance.” *United States v. United States Dist. Court*, 407 U.S. 297,  
 10 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). The Fourth Amendment regulates “not only  
 11 the seizure of tangible items, but extends as well to the recording of oral statements.” *Id.*,  
 12 quoting *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).  
 13 The Court has reasoned that “the broad and unsuspected governmental incursions into  
 14 conversational privacy which electronic surveillance entails necessitate the application of  
 15 Fourth Amendment safeguards.” *United States v. United States Dist. Court*, 407 U.S. at  
 16 313 (footnote omitted).

17 Even outside the context of wiretaps, “[t]he proceeding by search warrant is a  
 18 drastic one and must be carefully circumscribed so as to prevent unauthorized invasions  
 19 of the sanctity of a man’s home and the privacies of life.” *Berger v. New York*, 388 U.S.  
 20 41, 58, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) (internal quotations omitted). When it  
 21 comes to wiretapping, however, “drastic” is an understatement. “Few threats to liberty  
 22 exist which are greater than that posed by the use of eavesdropping devices.” *Berger*,  
 23 388 U.S. at 63. When drafting the initial wiretap act, Congress was keenly aware that,  
 24 with a wiretapping device installed, “Every spoken word relating to each man’s personal,  
 25 marital, religious, political, or commercial concerns can be intercepted by an unseen  
 26 auditor and turned against the speaker.” S. REP. NO. 90-1097, at 38 (Apr. 29, 1968),  
 27 reprinted in 1968 U.S.C.C.A.N. 2112, 2154.

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28  
 714, 876, 879.

1           The Fourth Amendment's prohibition of unreasonable searches and seizures  
 2 extends not only to the initiation of searches but also to the manner in which searches are  
 3 conducted. *United States v. Ramirez*, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191  
 4 (1998) ("The general touchstone of reasonableness which governs Fourth Amendment  
 5 analysis governs the method of execution of the warrant.") (citation omitted); *Dalia v.*  
 6 *United States*, 441 U.S. 238, 257, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979) ("it is generally  
 7 left to the discretion of the executing officers to determine the details of how best to  
 8 proceed with the performance of a search authorized by warrant – *subject of course to the*  
 9 *general Fourth Amendment protection 'against unreasonable searches and seizures.'*"')  
 10 (footnote omitted; emphasis added).

11

12 **I. The Wiretap Orders Are Facially Defective in Authorizing Law Enforcement**  
 13 **to Delegate the Essential Law Enforcement Function of Executing the Search**  
 14 **Warrant to Contractors Conducting the Search for Personal Gain and in the**  
 15 **Absence of Any Compelling Reason Why the Search Could Not Be Executed**  
 16 **by Law Enforcement Personnel**

17

18        "In executing a search warrant, government officials must ensure that the search is  
 19 conducted in a way that minimizes unwarranted intrusions into an individual's privacy."  
 20 *United States v. Sparks*, 265 F.3d 825, 831 (9th Cir. 2001), *overruled on other grounds*,  
 21 *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007). Capitulating to law enforcement's  
 22 request, Congress has permitted government agents to enlist civilian contractors to assist  
 23 them in executing wiretaps. 18 U.S.C. § 2518(5). The "authority to '[approve]'  
 24 'interception of wire or oral communications,' 18 U.S.C. §§ 2516(1), (2), [is] subject of  
 25 course to constitutional limitations." *Dalia v. United States*, 441 U.S. 238, 250, 99 S.Ct.  
 26 1682, 60 L.Ed.2d 177 (1979). The Ninth Circuit has set forth a three-pronged test to  
 27 determine the circumstances in which civilian participation in a search does not render a  
 28 search and seizure unreasonable under the Fourth Amendment:

1           First, the civilian's role must be to aid the efforts of the police. In other  
 2           words, civilians cannot be present simply to further their own goals.  
 3           *Wilson v. Layne*, 526 U.S. 603, 613-14, 119 S.Ct. 1692, 143 L.Ed.2d 818  
 4           (1999) (inviting media to 'ride along' on execution of warrant violates the  
 5           defendant's Fourth Amendment rights). Second, the officer must be in  
 6           need of assistance. Police cannot invite civilians to perform searches on a  
 7           whim; there must be some reason why a law enforcement officer cannot  
 8           himself conduct the search and some reason to believe that postponing the  
 9           search until an officer is available might raise a safety risk. Third, the  
 10          civilians must be limited to doing what the police had authority to do.

11  
 12          *Sparks*, 265 F.3d at 831-32.

13          Here, the wholesale delegation of authority to civilian contractors fails both the  
 14          first and the second prong. As best as appears from the discovery, the civilian contractors  
 15          had no reason to participate in the search other than that they were hired to do so. This  
 16          incentive of personal remuneration by itself calls into question the independence and  
 17          neutrality of the private monitors, who had an incentive to err on the side of seizure over  
 18          privacy since the failure to seize conversations would inevitably lead to the termination  
 19          of the wiretap and, therefore, the termination of their contract project. Cf. *Tumey v. Ohio*,  
 20          273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

21          Even professional "prosecutors and policemen simply cannot be asked to maintain  
 22          the requisite neutrality with regard to their own investigations – the 'competitive  
 23          enterprise' that must rightly engage their single-minded attention." *Coolidge v. New*  
*Hampshire*, 403 U.S. 443, 450, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). It is all the more  
 25          improbable to civilian individuals who have not sworn to uphold the law or duly and  
 26          faithfully execute them can be expected to approach the execution of a search warrant  
 27          with the same degree of professionalism as a trained officer or law enforcement agent.

28          Second, there is no suggestion that the FBI or DEA were "in need of assistance."

1 From all that appears from the discovery, there was *no* reason why the law enforcement  
 2 officers could not themselves perform the searches. There is no reason to believe that  
 3 law enforcement personnel were not available to conduct the electronic searches and  
 4 seizures nor any reason why the seizures could not be postponed until a law enforcement  
 5 officer was available. There is no suggestion that “safety risk” inspired delegation of the  
 6 search to persons other than professional law enforcement personnel.

7       The task of intercepting telephone conversations – no different than the execution  
 8 of a traditional search warrant – implicates significant, important privacy concerns calling  
 9 for matters of professional law enforcement judgment, not just the gut reaction of a hired  
 10 civilian contractor.

11       Once an issuing judge has granted permission for law enforcement to undertake  
 12 the highly intrusive activity to eavesdropping on private telephonic conversations, only  
 13 the monitors charged with carrying out the order can ensure protection of Title III’s  
 14 equally important purpose of “protecting the privacy of wire and oral communications,”  
 15 S. Rep. No. 90-1097, at 38,<sup>11</sup> by following the strict minimization requirements of 18  
 16 U.S.C. § 2518. Only the monitors executing the order can effectively protect privacy by  
 17 deciding when *not* to listen to or record conversations that appear to go beyond the scope  
 18 of the investigation. Notably, unlike all the other safeguards contained in Title III, the  
 19 requirement that intercepting officers limit the scope of seizures is the only safeguard that  
 20 operates after the wiretap order has been issued.

21       The risk of “indiscriminate use of [eavesdropping by] law enforcement raises  
 22 grave constitutional questions under the Fourth and Fifth Amendments and imposes a  
 23 heavier responsibility on this Court in its supervision of the fairness of procedures.”  
 24 Berger, 388 U.S. at 56. In short, the monitors’ decision to minimize – or not to minimize  
 25 – interception of a particular conversation is the bulwark protection that there be “no

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27       28 <sup>11</sup>*See also* S. REP. NO. 90-1097, at 46, reprinted in 1968 U.S.C.C.A.N. 2162 (under  
Berger, “Limitations on the officer executing the eavesdrop order which would [] prevent  
 his searching unauthorized areas” are essential to constitutionality of eavesdropping).

1 greater invasion of privacy . . . than was necessary under the circumstances.” *Berger*,  
 2 388 U.S. at 57.<sup>12</sup>  
 3

4 **II. To The Extent the Seizures Were Delegated to Private Civilian Contractors  
 5 Without a Compelling Reason, The Communications Seized Under the  
 6 Wiretap Orders Were Unlawfully Intercepted**

7 The Government has produced no evidence tending to establish that civilian  
 8 contractors were subject to any degree of supervision by law enforcement in executing  
 9 the wiretap warrants. While “Section 2518(5) does not require the government to follow  
 10 any specific protocol to properly supervise a wiretap,” *United States v. Reed*, 575 F.3d  
 11 900, 918 (9th Cir. 2009), here, there is no indication that the government provided any  
 12 supervision whatsoever. The government, when applying for the wiretaps, made a host  
 13 of representations to the issuing judge about how it would supervise and monitor the  
 14 execution of the wiretaps. Despite several informal and formal requests, the Government  
 15 has provided *no* information to corroborate that it followed through on those  
 16 representations. In the event the court does not suppress the evidence collected through  
 17 the wiretaps on the ground that the warrants were defective on their face, the defendants  
 18 seek an evidentiary hearing at which to present evidence that the seizures were executed  
 19 in a manner inconsistent with the Fourth Amendment.

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 21 ///

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23  
 24 <sup>12</sup>Because Congress’s legislative power “may not be exercised in a way that violates  
 25 other specific provisions of the Constitution.” *Saenz v. Roe*, 526 U.S. 489, 508, 119  
 26 S.Ct. 1518, 143 L.Ed.2d 689 (1999), the statutory grant of permission to delegate wiretap  
 27 searches to private contractors nonetheless violates the Fourth Amendment’s protection  
 28 against searches that are carried out in an unreasonable manner. Lacking any justification  
 for enlisting private civilian contractors to perform what is an essentially law  
 enforcement function that law enforcement is fully capable of performing, the wiretap  
 orders violated the constitution.

## CONCLUSION

For all the foregoing reasons, the motion should be granted.

Respectfully submitted,  
KESTENBAUM EISNER & GORIN LLP

Dated: June 30, 2012

/S/ ALAN EISNER

**ALAN EISNER  
Attorney for Defendant  
JUAN GIL**